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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

TELEPHONE NEWS SYSTEM, INC., an Illinois corporation,

Plaintiff-Appellant,

vs.

ILLINOIS BELL TELEPHONE COMPANY, an Illinois corporation,

Defendant-Appellee,

UNITED STATES OF AMERICA,

Intervenor-Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

This appeal is taken by Telephone News System, Inc. (plaintiff) from the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, dismissing plaintiff's complaint which sought to enjoin Illinois Bell Telephone Company (defendant) from discontinuing telephone facilities furnished to plaintiff.

OPINIONS BELOW.

Two opinions were rendered in the instant case. The first, *Telephone News System, Inc.* v. *Illinois Bell Telephone Co.*, 210 F. Supp. 471, was by the District Judge who found against the plaintiff on the factual issues presented, but determined that a substantial constitutional question was presented by the statute involved and, therefore, convened a three judge District Court (210 F. Supp. 477, 478). Thereafter, the District Court of three judges rendered its opinion which is reported at 220 F. Supp. 621.

Kelly v. *Illinois Bell Telephone Co.*, 210 F. Supp. 456, is companion to the *Telephone News* case reported at 210 F. Supp. 471.

The foregoing three opinions are printed as Appendices A, B, and C, respectively.

JURISDICTION.

This action was brought to enjoin Illinois Bell Telephone Company from disconnecting, discontinuing, or otherwise terminating the telephone facilities furnished by it to the plaintiff. On April 25, 1962, the Department of Justice, by an Assistant Attorney General, wrote to the Illinois Bell Telephone Company ordering that, pursuant to the provisions of Title 18 USC §1084(d), the telephone company discontinue the leasing of its telephone facilities to the plaintiff. This directive was issued, the letter said, on the ground that information in the files of the Department of Justice revealed that plaintiff's telephone facilities were being and would be used for the transmission and receiving of gambling information in interstate commerce in violation of Federal law. April 27, 1962, the telephone company, in compliance with the government's letter, wrote to the plaintiff that its telephone services

would be discontinued on May 5, 1962. Plaintiff's complaint for a temporary restraining order and permanent injunction followed. The judgment of the District Court of three judges dismissing the compiaint was entered August 14, 1963. Plaintiff's Petition for Rehearing was denied September 23, 1963. Plaintiff's Notice of Appeal was filed November 21, 1963.

This court's jurisdiction of the appeal is conferred by 28 USC §1253 and §2101(b).

The following cases sustain the jurisdiction of this Court to review the judgment on direct appeal: *Paul* v. *United States*, ... U.S. ....., 9 L. ed. 2d 292, 296; *United States* v. *Georgia Pub. Serv. Com.*, ... U.S. ....., 9 L. ed. 2d 317, 320; *Hannah* v. *Larche*, 363 U.S. 420, 428; *Query* v. *United States*, 316 U.S. 486, 490; *Radio Corp. of America* v. *United States*, 95 F. Supp. 660, 664, affirmed, *Radio Corp. of America* v. *United States* 341 U.S. 412.

STATUTES INVOLVED.

1. Title 18 USC §1084(d):

> §1084. Transmission of wagering information: penalties
>
> (a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.
>
> (b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign

commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored. Added Pub.L. 87-216, § 2, Sept. 13, 1961, 75 Stat. 491.

2. Sections 28-1(a)(10) and 34-4 of the Illinois Criminal Code of 1961 (Ill. Rev. Stat., 1961, Ch. 38, §28-1(a)(10) and §34-4), effective January 1, 1962:

"§28-1. Gambling.

(a) A person commits gambling when he:

• • •

(10) Knowingly transmits information as to wagers, betting odds, or changes in betting odds by

telephone, telegraph, radio, semaphore or similar means; or knowingly installs or maintains equipment for the transmission or receipt of such information.

"§34-4. This code shall take effect January 1, 1962."

QUESTIONS PRESENTED.

1. Whether the procedures authorized by 18 USC §1084(d) on their face or as here applied, violate the constitutional guaranties afforded by the Fifth and Sixth Amendments to the Constitution because they permit removal of plaintiff's telephone facilities and the resultant destruction of its business after a civil trial upon a criminal charge, despite the fact that the Government was self admittedly the real party in interest, the quantum of proof required to authorize a judgment that a criminal statute had been violated was a preponderance of the evidence, in which proceeding there was no right to be indicted for violating a specific statute, to confront witnesses, or to be presumed guilty until proven otherwise, and the right to be afforded any of the other guaranties of a criminal trial was missing.

2. Could the single judge and three judge court properly predicate their finding that plaintiff had violated Section 28-1(a)(10) of the Illinois Criminal Code of 1961 by transmitting gambling information in interstate commerce when:

(a) The only testimony or evidence in the record concerning any transmissions in interstate commerce by plaintiff was that such interstate transmissions did not extend beyond October, 1961, and

(b) The Illinois Criminal Code of 1961 did not, by its terms, become effective until January 1, 1962?

3. Is Section 28-1(a)(10) of the Illinois Criminal Code of 1961 on its face or as here applied prohibiting the transmission of information as to wagers, betting odds or changes in betting odds, such a prohibition being unrelated in time to any race, game or contest, repugnant to the First and Fourteenth Amendments to the Constitution of the United States as a denial of free speech and an unreasonable exercise of the police power of the State of Illinois?

STATEMENT OF THE CASE.

Plaintiff, an Illinois corporation, has, since 1956, provided without charge certain recorded information concerning horse racing to the general public. Anyone can obtain such information by dialing plaintiff's telephone number which is listed in the Chicago directory. Through a device known as a "Sports Printer", leased from United Press International News Service, plaintiff receives daily news and results of various sporting events, including horse racing. The identical information received by Telephone News over the facilities of the Sports Printer, including information relative to entries, jockeys, weights, odds, results, scratches*, and mutuel prices is furnished in precisely the same manner by United Press International to all of the major daily newspapers throughout the country.

After receiving the results and mutuels of the races from various of the tracks throughout the country, plaintiff causes voice recordings of such information to be made in its offices. These recordings give the name of the horses finishing first, second, and third, and the mutuel price returned by the winner. Each of the recordings contains the results of approximately five races at different major tracks throughout the country.

* Scratches are horses which have been withdrawn or eliminated from a race.

The recordings are transcribed on an electronic device leased from Illinois Bell Telephone Company. From approximately 1:00 P.M. until 6:00 P.M. daily, except Sundays, the recordings are revised and brought up to date on an average of four or five times a day to reflect the results of later races after information concerning the same is received by plaintiff over the facilities of the Sports Printer. The interval between the time the results and mutuels of a race at any given track become official and the time such information is transmitted over the Sports Printer varies from a minimum of twelve minutes to a maximum of thirty minutes. On days when sports news is unusually heavy, substantial delays in transmitting the results occur.

On the date the plaintiff filed its complaint its income was derived from payments received from Illinois Sports News in the amount of $600.00 per week. In consideration for this weekly payment, Illinois Sports News received spot advertising commercials, which messages were transcribed on the same recordings disseminating the other racing information as afore-described. The advertising facilities of the plaintiff were equally available to all who might desire to use them.

On April 25, 1962, the United States Department of Justice, by Herbert J. Miller, Jr., Assistant Attorney General, wrote to Illinois Bell Telephone Company as follows:

"Mr. Floyd Brown
Security Department
Illinois Bell Telephone Company
212 West Washington Street
Chicago 6, Illinois

Dear Mr. Brown:

Information in the files of the Department of Justice reveals that the telephone facilities located

at the following place are being and will be used for the transmission and receiving of gambling information in interstate commerce in violation of Federal law:

Telephone News System, Incorporated
81 West Van Buren Street
Chicago, Illinois
(WEbster 9-1900)

Pursuant to the provisions of subsection (d) of Section 1084 of Title 18, United States Code, you are therefore required to discontinue the leasing of said facilities, after reasonable notice to the subscriber."

/s/ Herbert J. Miller, Jr.,
Assistant Attorney General

Under date of April 27, 1962, the Telephone Company, by F. H. Brown, Chief Special Agent, wrote to plaintiff as follows:

"Telephone News System, Incorporated
81 West Van Buren Street
Chicago, Illinois

Gentlemen:

We have received a letter from the United States Department of Justice, acting under Title 18 of the U.S. Code, Section 1084(d), requiring us to discontinue service on the telephone facilities furnished to you at 81 West Van Buren Street, Chicago, Illinois, after reasonable notice to you.

It is our present intention to comply with this letter at 9 A M., C.D.T., on May 5, 1962."

Very truly yours,
/s/ F. H. Brown,
Chief Special Agent

On May 4, 1962, plaintiff filed its complaint in the District Court naming Illinois Bell Telephone Company

as defendant, praying that initially a temporary restraining order issue against the defendant, and upon final hearing and determination a permanent injunction be entered restraining it from in any manner interfering with, disconnecting, or terminating the telephone facilities furnished by it to plaintiff. In its complaint plaintiff denied that it was, in the words of Mr. Miller, using its telephone facilities for the transmission and receiving of gambling information in interstate commerce in violation of Federal law. In the alternative, it contended that Title 18 §1084(d) was unconstitutional and void.

Pending final determination, the court entered a temporary restraining order preventing removal of plaintiff's telephone facilities.

Within five days after the complaint was filed, the United States filed a motion to intervene as of right, or in the alternative for permissive intervention, alleging that it was the real party in interest, contending that, "the controversy is, as a practical matter, actually between the plaintiff and the Government." On the same day, the Government filed its answer to the complaint whereby it put in issue the question of whether plaintiff was guilty of the charges contained in Miller's letter to the Telephone Company concerning plaintiff's alleged illegal use of its telephone facilities in violation of Federal Law. The telephone company filed a neutral answer approximately three weeks later.

Ten days later, pursuant to notice, the Government took the evidence deposition of LeRoy Retelle on May 22, 1962 at Grand Rapids, Michigan. The testimony adduced by the Government from Retelle was that he had been a bookmaker in Lansing, Michigan from 1957 to October 5, 1961, accepting bets on horse races and

football games. He further testified that in the course of his bookmaking activities he had occasion on the average of six times a week to call the number of Telephone News in Chicago from Lansing, Michigan for the purpose of obtaining certain information as to which horses had been "scratched", which information he used in his business. However, he testified positively that he ceased his bookmaking activities in October of 1961 and never used the facilities of Telephone News subsequent to October 5, 1961 (Retelle's Dep., p. 13). This was the only testimony or evidence in the record concerning the fact that plaintiff's telephone facilities had even been used to transmit or receive racing information in interstate commerce.

The single judge District Court found that plaintiff had not violated any Federal law, but that its activities as above described did violate Section 28-1(a)(10) of the Illinois Criminal Code of 1961. This finding was based solely upon the testimony of Retelle that he had called plaintiff's number to obtain information as to horses which had been "scratched," or eliminated, from the day's racing (Retelle's Dep., p. 16). Retelle further testified that he had never called the plaintiff's number in the afternoon, that he had never obtained any race results or mutuels via plaintiff's facilities, that he had obtained race results from a radio station in Canada (Retelle's Dep., pp. 27, 28) but that he had only called in the morning to ascertain what horses had been "scratched" in order to insure that he would not accept a bet on a horse not running that day. Despite this fact, the single judge District Court found(App., 3a, 10a) (a finding which was concurred in by the three judge Court (App., 42a, 43a), that plaintiff violated the Illinois statute by transmitting relatively fast or rapid information as to results and mutuels in interstate commerce. Retelle never testified

to such a state of facts, and the record is, consequently devoid of any testimony to support that conclusion.

The District Court of three judges (Judge Will specially concurring) rejected plaintiff's arguments that section 1084(d) of Title 18, USC is unconstitutional, holding that it accords due process to one situated as plaintiff on the ground that the sanction imposed upon a finding of guilty cannot be defined as "punishment" in the criminal sense and that the procedures employed are sustained by the familiar principles applicable to proceedings in forfeiture or libel cases.

Judge Will concurred in the majority's conclusion on the ground that although the incongruity of the ultimate judgment produced was necessarily assured by the incongruous procedure authorized by §1084(d) (App. 47a, 48a), the cases governing forfeiture or libel proceedings appear to sustain the judgment.

THE QUESTIONS ARE SUBSTANTIAL.

This case presents substantial questions concerning the constitutionality of a statute enacted in 1961 (Title 18 USC §1084(d)) investing all law enforcement agencies—Federal, State, and local—with a novel means of prosecuting those accused of violating a Federal, State or local law involving the transmission of gambling information in interstate commerce. It involves the issue of whether law enforcement agencies, on the basis of information ostensibly contained in their files can, by threatening removal of a telephone subscriber's communication facilities, force an involuntary initiation by the subscriber of a civil equity proceeding to protect his property, thus converting a criminal into a civil proceeding, and thereby effectively eliminate all of of the traditional safeguards which are guaranteed one accused of a crime (App 46a, 47a). This case can determine whether Title 18 USC §1084(d)

will be the prototype of a new brand of law whereby crimes will be prosecuted civilly in such fields as anti-trust, the sale and distribution of securities, income and sales taxes, and union activities, on the grounds that confiscation of a business is not punishment and that the forfeiture and libel laws are authority for proceeding in the manner in question (App. 48a, 49a).

It further presents the question of whether the plaintiff has been found guilty of violating the provisions of a state law which did not become effective until three months after the last of the events transpired upon which the finding of guilty is predicated.

Lastly, the question is presented as to whether section 28-1(a)(10) of the Illinois Criminal Code of 1961 on its face, or as here applied, prohibiting the transmission of any information as to wagers, betting odds, or changes in betting odds, such prohibition being unrelated in time but in race, game, or contest, is repugnant to the First and Fourteenth Amendments to the Constitution of the United States as constituting a denial of free speech and an unreasonable exercise of the police power of the State of Illinois.

THE PROCEDURES AUTHORIZED BY TITLE 18 USC §1084(d) AND EMPLOYED IN THIS PROCEEDING DEPRIVE PLAINTIFF OF THE RIGHTS GUARANTEED TO IT BY THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The majority opinion predicates its finding on the premise that section 1084(d) of Title 18, USC is preventive or remedial only, not punitive, that the procedures authorized by it are reasonably calculated to eradicate organized gambling and, therefore, eliminate the need for the procedural safeguards afforded to one

accused of crime. It holds that these protections need not be extended to a telephone subscriber charged, tried, and convicted in a civil proceeding of violating a State law involving gambling. The opinion further holds that the nature of the action below was similar to a forfeiture proceeding, that it was, consequently, in rem, and partook of the nature of a civil suit, not a criminal proceeding.

The effect of the majority opinion is to sanction governmental "regulation" of crimes via civil proceedings. It holds that if a business is destroyed en route, though the result may seem harsh, yet this is but a necessary adjunct of the regulatory power invested in Congress. The cases cited by the majority in support of its holding that the statute is non-penal involve legislation regulating a particular type of business or profession by enactments excluding from the field those who had, in the past, been convicted of a crime (*Murphy* v. *United States*, 272 US 630; *De Veau* v. *Braisted*, 363 US 144; *Barsky* v. *Board of Regents*, 347 US 442; *Flemming* v. *Nestor*, 363 US 603).

Thus, in *De Veau* v. *Braisted*, 363 US 144, the attack was upon a New York statute barring convicted felons from holding any office in the Waterfront unions. This court upheld the constitutionality of the statute upon the ground that it was a preventive, or regulatory measure, reasonably designed to effect elimination of criminal elements from the New York waterfront. But the *sine qua non* of the statute there involved was past conviction of a felony. The question in the instant case is whether the Government may obtain what is tantamount to a conviction of crime in a civil proceeding and then, upon that basis *and in the same proceeding*, put a person out of business. Likewise, in *Flemming* v. *Nestor*, 364 US 603, the statute

in question provided for the termination of benefits payable under the Social Security Act to an alien person deported under the provisions of the Immigration and Nationality Act. Nestor had been deported for being a communist and by reason thereof his benefits under the Act were discontinued. This Court, in a five to four opinion, held that terminating Nestor's social security benefits did not amount to punishing him without a judicial trial. Deprivation of those benefits, this Court held, did not amount to "punishment" because Nestor had never become absolutely vested with the right to receive the benefits.

This Court said (363 US 617):

> "*Here the sanction is a mere denial of a noncontractual governmental benefit. No affirmative disability or restraint is imposed*, and certainly nothing approaching the 'infamous punishment' of imprisonment, as in *Wong Wing*, on which great reliance is mistakenly placed." (Emphasis added).

We respectfully submit that the order of the District Court decreeing the demise of the plaintiff can hardly be said not to be the imposition of an affirmative disability or restraint.

In *Barsky* v. *Board of Regents*, 347 US 442, another case cited in the majority opinion, the question was whether a state could bar from practice physicians convicted of a crime. There, again, the condition precedent to the exclusion of the physician was the fact of conviction of a crime in another and unrelated criminal proceeding.

These cases do not furnish support for validating the civil procedures adopted by the Government to find plaintiff guilty of violating a State law, and the resultant

decree that it shall lose its business. The issues in *De Veau, Flemming* and *Barsky* were whether or not past convictions could form the basis for automatic exclusion from participating in a particular profession or occupation, or the loss of certain non-contractual benefits.

But even adopting the District Court's reasoning that the question of whether or not the Government can proceed as it did below is governed by whether Section 1084(d) is a penal statute or merely a regulative one, we say that it is clearly penal. First of all Section 1084(d) is entitled, "Transmission of wagering information; *penalties*." (Emphasis added). In discussing whether a statute is penal or not, in *Trop* v. *Dulles*, 356 US 86, 95, 96, this Court said:

> "In form Section 401(g) appears to be a regulation of nationality. The statute deals initially with the status of nationality and then specifies the conduct that will result in loss of that status. But surely form cannot provide the answer to this inquiry. A statute providing that 'a person shall lose his liberty by committing bank robbery,' though in form a regulation of liberty, would nonetheless be penal. Nor would its penal effect be altered by labeling it a regulation of banks or by arguing that there is a rational connection between safeguarding banks and imprisoning bank robbers. The inquiry must be directed to substance.
>
> "This Court has been called upon to decide whether or not various statutes were penal ever since 1798. *Calder* v. *Bull*, (US) 3 Dall 386, 1 L ed 648. Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and ex post facto laws, it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties. In deciding whether or

not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a non-penal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise."

To paraphrase the foregoing opinion, to say that a person shall lose his business by transmitting gambling information interstate, though in form a regulation of gambling, would nonetheless be penal. Nor would its penal effect be altered by labeling it a regulation of gambling or by arguing that there is a rational connection between eliminating organized gambling and destroying one of the means by which it exists. The inquiry must be directed to substance.

We respectfully submit to argue that the procedures authorized by 18 USC §1084(d), which have culminated in plaintiff's loss of business, are regulatory, not punitive, is a gossamer-like conclusion which does not comport with reality.

Plaintiff will be put out of business as a proximate result of having been found guilty in a civil trial of transmitting gambling information in interstate commerce. A law which authorizes such a consequence ordains punishment as surely as does one which forfeits citizenship, *Mendoza-Martinez* v. *Kennedy*, 372 US 144, and the person faced with this consequence is entitled to the protection which the Fifth and Sixth Amendments to the Constitution guarantee everyone charged with a crime, as that case holds.

The proceedings below, characterized as "incongruous" in the concurring opinion (App. 47a, 48) cannot be sustained, as the majority seek to do, on the ground that the action involved is in the nature of a forfeiture proceeding, thus civil in nature (App. 25a), thereby authorizing a dispensation of the traditional safeguards attendant upon criminal prosecution. First of all, there is in the courts no inherent jurisdiction to condemn. The right to forfeit must be found in the plain language of the statute, *United States* v. *Lane Motor Co.*, 199 F2d 495, 496, 497, aff'md, *United States* v. *Lane Motor Co.*, 344 US 630; *United States* v. *Kaier*, 61 F2d 160. There is no authority to forfeit contained in Section 1084(d). Secondly, Section 1084(d) provides by its terms that, . . . "*no damages, penalty, or forfeiture, civil or criminal*, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency." (Emphasis supplied). Thus, there is also contained in the very statute relied upon, an affirmative prohibition against forfeiture proceedings taking place.

In his concurring opinion Judge Will has described more persuasively than we the insidious nature of this statute and the results which the procedures it authorizes

may ultimately legitimatize if pursued to their logical conclusion. Should the techniques employed in this case be approved, then as Judge Will said (220 F. Supp. 643):

> "In our inter-dependent economy, where rapid communication is vital to virtually every commercial enterprise, the withdrawal of telephone facilties on the ground that some federal, state or local law enforcement officer has reason to believe that they are being used in violation of a federal, state or local law, may prevent some law violations. But it will also eliminate all of the basic safeguards which we have so carefully developed to protect the accused even though he be ultimately found guilty.
>
> "And, of course, the technique need not be limited to telephone facilities, since the withdrawal of other utility services would be equally proper."

THE FINDING BY THE SINGLE JUDGE AND THREE JUDGE COURT THAT PLAINTIFF HAD VIOLATED SECTION 28-1(a)(10) OF THE ILLINOIS CRIMINAL CODE OF 1961 WAS BASED ON EVENTS WHICH OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE. THE PLAINTIFF HAS, THEREFORE, BEEN EXPOSED TO THE OPERATION OF AN EX POST FACTO LAW.

None of the evidence introduced by the government showed that plaintiff's facilities had ever been used to transmit any information in interstate or foreign commerce subsequent to October 5, 1961.

In order to prove a case under §1084(d), it was incumbent upon the Government to show two things:

> (1) That the facilities of plaintiff had been used for the purpose of transmitting or receiving gambling information in violation of Federal, State or local law, and

(2) That such transmission or reception had been in interstate or foreign commerce.

The only testimony as to any use made of plaintiff's facilities was furnished by LeRoy Retelle, who testified that he obtained "scratch" information, *i.e.* the names of horses which had been withdrawn or eliminated from the day's racing, by calling plaintiff's telephone number in Chicago, Illinois. These calls were placed from Lansing, Michigan during the period of approximately 1957 to October, 1961. Thus did the Government establish the interstate character of plaintiff's transmissions. *However, Retelle testified in positive terms that he never placed a call to plaintiff's number subsequent to October 5, 1961* (Retelle's Dep., pp. 13, 14, 15, 18).

Section 34-4 of the Illinois Criminal Code of 1961 (Ill. Rev. Stat., 1961, Ch. 38, §34-4) provides as follows:

"This Code shall take effect January 1, 1962."

There is no finding in either of the two opinions rendered in this case that there was any evidence in the record which proved an interstate use of plaintiff's facilities in violation of the Illinois law, with the exception of Retelle's testimony. The opinion by the single judge Court, the three judge Court, and the concurring opinion make this abundantly clear (*Telephone News System, Inc.* v. *Illinois Bell Telephone Co.*, 210 F. Supp. 471, 473, 476; *Telephone News System, Inc.* v. *Illinois Bell Telephone Co.*, 220 F. Supp. 621, 624, 641).

Upon these facts, to sustain the finding that plaintiff had violated the Illinois statute would be to subject it to the operation of an ex post facto law. In *Burgess* v. *Salmon*, 97 US 381, this Court decided the precise question presented here:

"The case presents but a single point: Can a manufacturer be punished, criminally and civilly, civilly here, for the violation of a statute when the statute was not in force at the time the act was done? In other words: Can a person be thus punished when he did not contravene the provisions of the statute. . . ."

The question was answered in the negative, this Court saying (97 US 384):

"In the present case, the acts and admissions of the government establish the position that the duties exacted by law had been fully paid, and the goods had been surrendered and transported before the President had approved the act of Congress imposing an increased duty upon them.

"To impose upon the owner of the goods a criminal punishment or a penalty of $377 for not paying an additional tax of four cents a pound, would subject him to the operation of an *ex post facto* law.

"An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed, or a punishment in addition to that then prescribed. *Carpenter et al.* v. *Commonwealth of Pennsylvania*, 17 How. 456.

"Had the proceeding against Salmon & Hancock been taken by indictment instead of suit for the excess of the tax, and the one was equally authorized with the other, the proceeding would certainly have fallen within the description of an *ex post facto* law."

To the same effect is *Johannessen* v. *United States*, 225 U.S. 227, 242.

We submit the record is clear that the Government has failed to introduce any evidence proving that plaintiff violated the Illinois statute.

SECTION 28-1(a)(10) OF THE ILLINOIS CRIMINAL CODE VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION IN THAT IT EXCEEDS THE POLICE POWER OF THE LEGISLATURE TO ENACT AND VIOLATES THE FIRST AMENDMENT TO THE CONSTITUTION BECAUSE IT PROHIBITS, IN TOTO, THE TRANSMISSION BY TELEPHONE OF INFORMATION TO WAGERS, BETTING ODDS, OR CHANGES IN BETTING ODDS UNRELATED IN TIME TO ANY RACE, GAME, OR CONTEST.

If the purpose and objective of section 28-1(a)(10) of the Illinois Criminal Code is to suppress and eliminate gambling, the question then becomes whether that section is a valid exercise of the police power of the State reasonably designed to remedy the evils toward which it is directed. If not, it violates the Fourteenth Amendment to the Constitution of the United States.

In the proceedings below, and here, plaintiff relies principally upon one case which, it is respectfully submitted, controls the question. In *Parkes* v. *Judge of Recorder's Court*, 236 Mich. 460, 210 N.W. 492, 47 A.L.R. 1128 complaints were filed against four Detroit newspapers on the ground that they had violated a Michigan statute entitled, "An act to suppress gambling and to prohibit the publication and furnishing of information concerning gambling." Section 4 of the act provided, in pertinent part, as follows:

> "Section 4. It shall be unlawful for any person . . . by means of any newspaper, periodical, poster, notice or other mode of publication or reproduction to . . . print . . . or distribute to the public . . . or to any person . . . any statement or information concerning the making or laying of wagers or bets or to selling of pools or evidences of betting odds on any race, contest or game or on the happening of any event . . . contest or game. . . . The acts

herein prohibited may be deemed violations hereof when committed, after any game, contest, race or event, as well as when committed before any such game, contest, race, or event. . . ."

The Detroit Times was alleged to have violated the section by reason of the fact that an account of the Kentucky Derby appeared in its paper, containing the statement, "A $2 ticket on Flying Ebony paid $8.30."

The complaint against The Detroit Free Press involved a story to the effect that Mike McTigue "says he has laid $5,000 to $20,000 that he will stop Paul Berlenbach in their fight for the light heavyweight title at Yankee Stadium one week from tonight."

The Detroit News was charged with an offense because it carried substantially the same article as the Detroit Free Press.

The fourth defendant, Union News Company, a distributor, was charged with having sold and distributed issues of the New York Times which carried an account of an English horse race, together with the odds and price paid by the winner.

The foregoing complaints were presented to respondent, Judge of the Recorder's Court, and he refused to issue warrants on the ground that section 4 of the act on which the prosecution was based was unconstitutional because in conflict with the 14th Amendment to the Federal Constitution and that of the State Constitution. Mandamus proceedings were then instituted to compel him to issue the warrants.

Upon appeal to the Supreme Court of Michigan, the statute was held valid insofar as it prohibited the publication of the proscribed information *before* the happening of any race, game, or event, but found the statute un-

constitutional with reference to the prohibition against publication of such information *after* the event had taken place. The Michigan Supreme Court said (236 Mich. 468, 469):

> "It is argued that the court should construe the statute as having application only to harmful publications, that is, publications that have a tendency to encourage gambling. But when a case is prosecuted under this statute, who is to determine whether the publication is harmful? By prohibiting them the legislature has said that all publications of betting odds after the event are harmful, because they encourage gambling. And it having so declared, a jury would not be permitted to find otherwise. In other words, the mere fact of publication without regard to time or circumstances, or connection with any event, is made a violation of the statute. Has the legislature a right to do this? Its power to prohibit such publications rests upon a duty to protect the public against the injurious results that may follow. Therefore, when it prohibits publications that have no harmful public tendency, it exceeds its constitutional authority. It is our judgment that its wholesale prohibition of publications concerning bets and wagers unrelated in time to any race, game or contest, is an unreasonable exercise of police power, and is therefore beyond the constitutional authority of the legislature."

The majority opinion below attempts to sustain section 28-1(a)(10) of the Illinois Code by referring to the statement of the Joint Committee which drafted the Illinois Criminal Code (App., 42a) and draws from that statement the conclusion that the legislative purpose was to forbid rapid transmission of information concerning wagering shortly after the event. However, a reading of the statement issued by the Joint Committee and quoted by the court (App., 42a) discloses that it says nothing about transmissions occurring shortly after the event.

The Illinois statute says that a person "commits gambling" when he knowingly transmits the information described in section 28-1(a)(10). Therefore, just as in the *Parkes* case if an indictment were returned in 1964 by an Illinois Grand Jury charging a violation of the section on the ground that a person had knowingly transmitted information as to wagers, betting odds, or changes in betting odds concerning, for example, the 1962 Kentucky Derby, the jury would not be permitted to find the defendant not guilty if the specified facts were proved. As the Michigan Court said, "In other words, the mere fact of publication without regard to time or circumstances, or connection with any event, is made a violation of the statute."

In addition, it is clear that plaintiff only gives wider circulation to the information it receives via the leased United Press International News Service Sports Printer. The major daily newspapers receive and print precisely the same information which they obtain over the same facilities. Clearly, it is physically impossible for the information disseminated by plaintiff to be "fast" or "rapid" unless the same information furnished by United Press to the dailies throughout the country is also "fast" or "rapid." There has been no contention made that the information transmitted over the United States Sports Printer is illegal, or becomes so when printed by the newspapers. We do not argue upon hypotheses, but do say that if plaintiff is guilty of violating a law when it subsequently disseminates information legal when received by it, then there is a denial to it of the guaranties of the First Amendment to the Constitution and discrimination is practiced against plaintiff in favor of persons engaged in disseminating the same news by wire service.

CONCLUSION

The questions presented by this appeal are substantial and of compelling public importance. It is respectfully submitted that the Court should note its probable jurisdiction in order that it may be advised by briefs and oral arguments on the questions involved.

Respectfully submitted,

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